Supreme Court of the United States

OCTOBER TERM, 1954

No. 11

LUMBERMEN'S MUTUAL CASUALTY COMPANY,
PETITIONER

vs.

FLORENCE R. ELBERT,
RESPONDENT

ORIGINAL BRIEF ON BEHALF OF MRS. FLORENCE R. ELBERT, RESPONDENT (ON PETITIONER'S MOTION TO DISMISS FOR LACK OF JURISDICTION)

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LECOMTE, SHREVEPORT, LOUISIANA

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The decision below, the statement of the jurisdiction of the Court and the statutes involved are set forth in Petitioner's brief and in its petition for certiorari and, therefore, are not included here except, for ready reference, the pertinent Louisiana statutes are repeated.

LOUISIANA STATUTES INVOLVED

1.

Louisiana Civil Code, Article 2315:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; * * *"

2.

Louisiana Revised Statutes 22:655:

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be

urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

3.

Louisiana Civil Code Article 3045:

"The obligation of the surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound in solido jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors in solido."

QUESTION PRESENTED FOR REVIEW

Does the United States District Court, sitting in Louisiana, have jurisdiction to try a suit for damages for personal injury brought under the Louisiana direct action statute against the wrongdoer's insurer alone, where (a) the policy was applied for, issued and delivered in Louisiana, (b) the accident occurred in Louisiana, and (c) diversity of citizenship exists between the complainant and the defendant insurer but not between the complainant and the insured wrongdoer?

STATEMENT OF CASE

In addition to the statement contained in Appellant's brief, Respondent desires to make a short statement of the controlling material facts necessary for a decision here.

In Shreveport, Louisiana, on 21 February 1951, Respondent was injured while alighting from an automobile owned and operated by assured. Suit was brought against the insurer alone. From the pleadings (R. 1, 8), stipulation (R. 27) and policy (photostatic copy of original policy was sent up to this Court in its original form) (R. 27), all in the Transcript, the following facts are not in dispute:

1. The accident occurred in Louisiana.

2. The policy was applied for and issued in Louisiana.

3. Complainant and assured are and were both citizens of Louisiana (a) when the policy was applied for, (b) when the policy was issued, (c) when the accident occurred.

4. Petitioner, insurer, is a citizen of Illinois and authorized to do business in Louisiana and was such and was so authorized (a) when the policy was applied for and issued, and (b) when the accident occurred.

SUMMARY OF ARGUMENT

1.

The Louisiana direct action statute, which became a part of the contract of insurance when it was written, was enacted to protect the public interest by insuring that liability policies furnish adequate protection to persons injured, as well as protection to the insured.

2.

The Louisiana direct action statute gives to an injured person a new and *substantive* right, not recognized at common law or under Article 2315 of the Louisiana Civil Code (which creates liability for injuries resulting from fault). This substantive right is a distinct and different right or cause of action from that given an injured person to proceed against the tort-feasor under Article 2315 of the Louisiana Civil Code.

3.

The insured is not an indispensable party since the direct action statute confers on the injured party the optional right to sue the insurer alone. The Louisiana legislature has refused to amend the statute so as to *require* that the tort-feasor be joined.

4.

The question presented here had already been authoritatively decided prior to this case by the Fifth Federal Circuit in *New Amstedam Casualty Co. v. Soileau*, 167 F. 2d 767 (certiorari denied by this Court, 335 U. S. 822, 93 L. Ed. 376) and, in effect, has been decided by this Court in *Maryland Casualty Company v. Cushing*, 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. (Advance p. 519).

5.

This direct action statute does not attempt to give federal courts jurisdiction over controversies between injured Louisiana residents and insurance companies. Such jurisdiction arises only because the United States Con-

gress has provided for such jurisdiction where, in diversity cases, more than $3,000.00 is involved. Where the injured person and the insurance company are citizens of the same state, the statute does not attempt to create jurisdiction in the federal courts. Neither has the Louisiana Legislature attempted to take from foreign insurance companies the right to remove to the federal courts suits brought by Louisiana citizens against such foreign corporations transacting business in Louisiana. Rather, in controversies arising under the Louisiana direct action statute the test of federal court jurisdiction remains as always: Whether there is diversity of citizenship between the plaintiff and defendant, with more than $3,000.00 involved.

ARGUMENT

MAY IT PLEASE THE COURT:

I.

PURPOSE OF THE DIRECT ACTION STATUTE

We cannot better state the purpose of this statute than to quote the language of Mr. Justice Black in passing upon the very same statute in the *Cushing* case:

> "• • • For behind this 'direct action' statute lies a long history of state attempts to protect the public interest by ensuring that liability policies furnish adequate protection to persons injured. At one time insurance companies were commonly able to avoid payment of a single dollar on their policies whenever the insured was insolvent and therefore judgment-proof. The insurance, although bought and paid for, would remain untouched while valid

claims went entirely unsatisfied. To prevent this injustice many states passed laws of one kind or another which required insurance companies to pay injured persons even though the insured had paid out no money. The Massachusetts Supreme Judicial Court took the lead in sustaining a law of this type, Chief Justice Rugg suggesting its need to prevent liability insurance from becoming a 'snare to the insured and a barren hope to the injured.' Lorando v. Gethro, 228 Mass. 181, 189, 117 NE 185, 189, 1 ALR 1374. And, despite the fact that these state statutes wrote compulsory terms and obligations into all insurance contracts, this Court sustained such a statute applying to automobile insurance. Chief Justice Taft said that '. . . it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured.' Merchants Mut. Auto. Liability Ins. Co. v. Smart, 267 U.S. 126, 129, 130, 69 L. Ed. 538, 542, 45 S. Ct. 320. The Louisiana statute is an application of this same principle. It expresses the public policy of Louisiana that liability insurance exists for the protection and benefit of the injured as well as the insured. Davies v. Consolidated Underwriters, 199 La. 459, 475, 476, 6 So. 2d 351, 357. Under Louisiana's law an individual purchases liability insurance not for himself alone but also for those whom he may injure. This bargain is advantageous to the purchaser because claims against him can be satisfied in suits against the insurer."

The fact that there were 1,340,000 highway deaths and injuries in the United States in 1953 emphasizes the need that an injured person has for a practical remedy when he has been negligently injured in a highway accident.[1]

Other practical reasons for permitting a direct action against the insurer are set forth in an article published in the Wisconsin Law Review.[2]

II.

NEED MET BY CREATING A NEW AND SUBSTANTIVE RIGHT

Faced with the problem of doing something to protect its citizens who were injured due to the negligent operation of motor vehicles on the highways of this State, the Louisiana Legislature enacted this direct action statute. The effect of the statute is summarized in *Miller v. Commercial Standard Ins. Co.*, 199 La. 515, 520, 6 So. 2d 646, decided by the Supreme Court of Louisiana in 1942, when it said:

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1. Time Magazine, July 26, 1954, p. 15:
"**1,340,000 Casualties.** The President's plan was presented to the 1954 Governor's Conference at Bolton Landing, N. Y. by Vice President Richard Nixon. The need for an up-to-date road system, Nixon said, is dramatically evident in the annual statistics of highway deaths and injuries (1,340,000 in 1953, or nearly 20 times the total casualties in the first year or the Korean war)."

2. "The Insurer as Party Defendant In Automobile Accident Cases," Wisconsin Law Review, Vol. 1953, No. 4, July, at pg. 688. See also, article entitled "Direct Actions Against The Insurer," The Insurance Law Journal, No. 317, June 1949, at pg. 411.

"Act No. 55 of 1930 granted to persons injured or damaged by a motor vehicle covered by insurance against liability a privilege which they did not theretofore have. It gave to them 'a right of direct action against the insurer company' alone, to recover such damages as they may have sustained by the fault of the insured. Under Act No. 253 of 1918, they had no 'right of direct action' against the insurer except in cases where the insured was insolvent or bankrupt. But, under Act No. 55 of 1930, which amended the act of 1918, the injured person or his heirs may in all cases maintain a direct action against the insurer, under the terms and limits of the policy."

Whether the statute is substantive or procedural was debated for sometime in the Louisiana courts; but it seems now finally to be settled, both by the Louisiana Supreme Court and by the federal courts, that this Act created a new and substantive right unknown either to the common law or the civil law as set forth in Article 2315 of the Louisiana Civil Code. A late expression of the Louisiana Supreme Court is found in a decision rendered in 1950, *West v. Monroe Bakery*, 217 La. 189, 191, 46 So. 2d 122, where the Court flatly held that the statute is substantive, saying that it has been treated consistently:

"• • • as conferring *substantive rights* on third parties to contracts of public liability insurance, which become vested at the moment of the accident in which they are injured." (Emphasis by Court)

Likewise, Judge Dawkins, the author of the opinion in the case at bar, in a decision handed down by him in 1951, *(Bayard v. Traders & General Insurance Co.*, 99 F.

Supp. 343, 354,) analyzed a number of the decisions rendered by the appellate courts in Louisiana following the passage of the direct action statute, as well as the decisions by the Fifth Federal Circuit and Federal District Courts in Louisiana, and came to this conclusion:

> "For all of the reasons above recited, I am finally convinced that Act No. 55 of 1930 made a fundamental and substantial change in the right of action under these indemnity policies, or, as they are now called, liability contracts, not confined to procedure or remedy."

And, of course, the Fifth Federal Circuit, in the *Cushing* case, supra, in commenting on this statute, said:

> "Stripped of illusory technicalities, the Louisiana statute merely creates in favor of one who has been wrongfully injured, an additional and cumulative *remedy at law* against an insurer who has agreed to indemnify the *tort-feasor* against liability, by subrogating the injured person to all the rights of the insured within the terms and limits of the policy." (Emphasis by Court)

Despite his earlier holding in the *Bayard* case that direct action statute created a new and substantive right, the trial judge concluded in the case at bar (R. 40):

> "In any event, no matter who he names among these three choices as the party or parties defendant, is the same cause of action which is created by Article 2315 of the Code."

In this conclusion it is respectfully submitted the trial judge erred.

How can it be said that the cause of action against the insurer is the same cause of action that an injured party has against the tort-feasor (even though the tort-feasor must be negligent to permit recovery against his Insurer) when these vital distinctions exist:

1. The action against the insurer is not affected by the insolvency or bankruptcy of the tort-feasor;

2. The action against the insurer is one assumed by it under a contract of insurance voluntarily entered into for a premium;

3. The action against a tort-feasor is based on fault as provided by Article 2315 of the Civil Code — not on contract?

The fact that the cause of action against the tort-feasor is a different one from that given to an injured party by statute against a compensated insurer is made clear by decisions from other jurisdictions where one may not join in the same suit an action in tort with one based on contract. Among these is a decision by the Supreme Court of West Virginia, in *Conwell v. Hayes*, (1927), 103 W. Va. 69, 136 S.E. 604, 605, where the Court said:

"If we give to the language of the indorsement its usual and popular construction, then we must hold that it binds the insurer to direct liability to the injured person whether an action for damages is brought against the assured alone or against the assured and the insurer jointly. This construction, however, does not sanction a joinder of the insurer with the insured in these particular cases. Here,

the liability of the insured is predicated on a tort. The liability of the insurer is based on a contract."

Likewise, to the same effect is a decision by the Supreme Court of Iowa, in *Ellis v. Bruce* (1932), 215 Iowa 308, 245 N. W. 320, at page 323:

"• • • True plaintiff seeks but one recovery. But the liability for the recovery against the tort-feasor is predicated upon his wrongdoing; whereas the liability of the insurance company is predicated upon its contractural undertaking. The two purported causes of action are provable by different evidence. The contractual liability of the insurance company has no probative value to establish the liability of the tort-feasor for his tort. The liability of the insurance company upon its contract is subject to defenses which are in no sense available to the tort-feasor. The insurance policy contains several conditions and qualifications. Proof of compliance with the conditions is incumbent upon the plaintiff. Such proof sustains no relation to the commission of the tort. Though it be true that the commission of the tort by the tort-feasor is a factor in the case of plaintiff against the insurance company, yet the existence of the insurance policy is not a factor in the creation of liability of Bruce for the tort. Such is the general idea underlying the discussing in the Aplin case, though the duality of the causes of action was not challenged therein. We hold that the petition purports to set forth *two* causes of action, and not one." (Emphasis by Court)

Even Judge Rives, in his dissenting opinion in this case, recognized that the cause of action against the insurer is different from the one against the tort-feasor because

when he assumed that if an injured party failed against the insurer he might still sue the insured, said:

> "The judgment in the first suit cannot conclusively estop the injured party *for the issues would be different.*" (Emphasis supplied).

III.

TORT-FEASOR NOT INDISPENSABLE PARTY

The argument is made by petitioner insurance company that the tort-feasor is an indispensable party because, if not joined, the Court's decision would not be binding upon him. (Petitioner's brief, p. 13). But this argument is made without citation of any authority to support it. On the contrary, the Louisiana direct action statute has been construed by the Supreme Court of Louisiana to give the injured person the "optional right" either to sue the insurance company alone or join both the tort-feasor and the insurer. Thus, in *Reeves v. Globe Indemnity Company of New York*, 182 La. 905, 907, 162 So. 724, the Louisiana Supreme Court said:

> "The plaintiff exercised her statutory *optional right* to institute this suit against the defendant alone rather than jointly and in solido against the defendant and King." (assured). (Emphasis supplied).

Likewise, the same Court, in the case of *Miller v. Commercial Standard Ins. Co.*, 199 La. 515, 526, 6 So. 2d 646, said:

> "It is clear, we think, that the word 'may' as used in that clause relates to the *option granted* the injured person of bringing his suit either against the in-

surer company alone or against both it and the insured jointly and in solido." (Emphasis supplied).

Hence, if the injured party exercises his optional right and sues the insurer alone, he waives his right to sue the tort-feasor — he has exercised his option. It is significant, too, that no case is cited by petitioner where an attempt has been made to sue the tort-feasor after an unsuccessful suit against the insurer, despite the fact the statute has been in force for almost a quarter of a century.

As early as 1848 this Court held in *United States v. Hodge*, 6 Howard 276, 283, 12 L. Ed. 437, 440, in construing Article 3045 of the Revised Civil Code of Louisiana, that an action could be maintained in the federal courts of Louisiana against the surety alone without joining the principal, saying:

> "It is insisted that 'the action is brought wrong; and that, if the judgment be reversed, the plaintiffs cannot recover, because of the nonjoinder of Ker as a defendant.'"
>
> "The action against the sureties, omitting the principal, is sustained by the Louisiana Practice. In Maria Griffing, Adm'x, v. Caldwell, 1 Robinson, 15, it was held that a creditor has the right, but he is under no obligation, to include the principal and surety in the same suit. And in Smith, Adm'r., v. Scott, 3 Robinson, 258, it is said a surety, who binds himself with his principal, in solido, is not entitled to the benefit of discussion, and may be sued alone for the whole debt. So in Curtis v. Martin, 5 Martin, 674, it is laid down, that the surety may be sued without the principal."

Furthermore, to require the joinder of the tort-feasor, would not only have the effect of denying the injured person the optional right to sue the insurer alone, but would also deny to the insured one of the advantages of having insurance for, as Mr. Justice Black said in the *Cushing* case:

> "This bargain is advantageous to the purchaser because claims against him can be satisfied in suits against the insurer."

Insurance companies have been unsuccessful in their attempts to have the Louisiana direct action statute amended so as to *require* the joinder of the insured. Senate Bill 73, introduced in the 1952 Session of the Louisiana Legislature for this purpose, died in the Senate Committee; and House Bill 600 to the same effect, introduced in the 1954 Session of the Louisiana Legislature, was defeated on the floor of the House of Representatives by a vote of 63 to 22. It is submitted that this Court should do none other than adopt the same construction of the statute as announced by the Supreme Court of Louisiana: That the insured is not an indispensable party and the injured party has the "optional right" to sue the insurer alone.

IV.

STARE DECISIS

The question here presented was first authoritatively decided by the Fifth Federal Circuit in the case of *New Amsterdam Casualty Co. v. Soileau* (C. C. A. 5th 1948), 167 F. 2d 767, certiorari denied 335 U. S. 822, 93 L. Ed.

376. The *Soileau* case is one of those cited by the Court in the case at bar when it said that

> "Upon principle and authority, and particularly upon that of our cases cited in the note, the judgment was wrong and must be reversed."

The point debated in the case at bar that there is no so-called "actual controversy' between the plaintiff and the insurance company was vigorously urged in the *Soileau* case, but the Court expressly considered and rejected that argument in the following language:

> "The case was tried to a jury and resulted in a verdict against appellant in the sum of $15,000. From the judgment entered upon the verdict, appellant appeals. Appellant contends (1) that the state of Louisiana, in passing Act No. 55 of 1930 permitting the insurer of an insured to be sued directly by an injured person *could not thereby confer jurisdiction on the federal court where the actual controversy is between citizens of the same State;*"

• • • • •

> "Equally without merit is the contention that the court below was without jurisdiction, since the *actual controversy* was one between the insured and the injured party, both citizens of Louisiana.

• • • • •

> "Where the asserted right of action arises by *subrogation* and not by assignment, the *subrogated party may sue on such right in a federal court if there is diversity of citizenship between him and the de-*

fendant, though the original debtor and the defendant are citizens of the same State. City of New Orleans v. Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102; 2 Hughes, Federal Practice, Sec. 894, p. 148." (All emphasis added).

When application was made to this Court for writs in the *Soileau* case the same language was used in the brief filed in support thereof where it was urged:

"* * * the jurisdiction of the Federal courts based on diversity of citizenship must depend upon the citizenship of the parties to the actual controversy, as determined from the applicable substantive law. * * * *the actual controversy to the determination of which this litigation presents itself is formulated between the respondent on the one hand and Louis O. Campbell on the other, who are both alleged to be residents of the Parish of Evangeline, Louisiana.* * * * the mere fact that there may be diversity of citizenship as between respondent and petitioner is not sufficient to confer jurisdiction on the Federal Courts under the Constitution of the United States and under the diversity provisions of the Judicial Code, 28 U. S. C. A. Sec. 41." (USSC Brief P. 12). (Emphasis added).

Following the decision of the Fifth Federal Circuit in the *Soileau* case and the denial of the application for writs by this Court, litigants continued to avail themselves of the provisions of the Louisiana direct action statute and at least twenty cases were presented to the

Fifth Circuit from Louisiana in which the same argument could have been made.[3] This long array of year after year assumption of jurisdiction should not be brushed aside by the courts. If experience demonstrates the citizens of Louisiana are not entitled to invoke the aid of the federal courts to gain the relief granted them by the laws of the State of Louisiana, then the Congress and not the courts, should make that decision and change the rules regarding jurisdiction in diversity cases.

Except for the fact that writs have been granted in the instant case, we would not hesitate to say that this Court has already conclusively adjudicated the issue here presented in the *Cushing* case, supra, for, as Mr. Justice Frankfurter said in speaking for himself and Mr. Justice Reed, Mr. Justice Jackson and Mr. Justice Burton:

> "We agree with the Court of Appeals that since diversity supports federal jurisdiction, the Jones Act need not be drawn upon for jurisdiction."

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3. Bankers Ind. Ins. Co. v. Green, 181 F. 2d 1, Thibaut v. Car & Gen. Ins. Corp., 181 F. 2d 494; American Ins. Co. v. Walker, 181 F. 2d 497, Great Amer. Ind. Co. v. Cormier, 187 F. 2d 107; Amer. Fire & Cas. Co. v. Jackson, 187 F. 2d 379; Louviere v. Lumbermens Mut. Cas. Co., 187 F. 2d 613; Belanger v. Great Amer. Ind. Co., 188 F. 2d 196; Williams v. Standard Accident Ins. Co., 188 F. 2d 206; Lumbermens Mutual Cas. Co. v. Hutchins, 188 F. 2d 214; Employers' Liability Assur. Corp. v. Lejeune, 189 F. 2d 521; Globe Indemnity Co. v. Stringer, 190 F. 2d 1017; Tauzin v. St. Paul Mercy Ind. Co., 195 F. 2d 223; Amer. Fire & Cas. Co. v. Gresham, 195 F. 2d 616; Lejeune v. Midwestern Ins. Co. of Okla. City, 197 F. 2d 149; Texas Mutual Ins. Co. v. Curtin, 197 F. 2d 617; Gillen v. Phoenix Ind. Co., 198 F. 2d 147; State Farm Mut. Auto. Ins. Co. v. Scott, 198 F. 2d 152; Fisher v. Home Ind. Co., 198 F. 2d 218; Cushing v. Maryland Casualty Co., 198 F. 2d 536.

In the same opinion Mr. Justice Black, in speaking for himself, the Chief Justice, Mr. Justice Douglas and Mr. Justice Minton, said

> "I agree with the Court of Appeals for the Fifth Circuit that the insurance companies' contentions 'overinflate a relatively simple proposition with apparent, but unreal, technical problems.' 198 F. 2d 536, 539."

And Mr. Justice Clark, in a concurring opinion, said:

> "I see no necessity for invalidating Louisiana's law by dismissing these direct actions."

On June 8, 1954, this Court dismissed the appeal in the case of *National Surety Corporation v. Louis Wilburn McDowell*, Docket No. 716, 98 L. Ed., (Advance 724) 68 So. 2d 189 for want of a substantial federal question. This was an appeal taken from the Court of Appeal of Louisiana, First Circuit, wherein the contention was made that the direct action statute was unconstitutional in that it denied Petitioner equal protection of the laws and of its property without due process of law.

V.

REGARDING SOME OF PETITIONER'S CONTENTIONS

With utmost respect it is submitted that the reasons given by Petitioner for the granting of the writ in this case and by Judge Rives in his dissenting opinion in the case at bar, are arguments which should be made to the Congress in seeking a change in the judicial code whereby

the federal courts are granted jurisdiction to hear diversity cases. It is argued that the federal court is divested of of jurisdiction to hear and determine this cause because of the number of cases which have been filed by Louisiana citizens in the federal court. However, the late Judge Porterie gave a short answer to this argument in *Lewis v. Manufacturers Casualty Ins. Co.*, W. D. La. 1952), 107 F. Supp. 465, 473, where he said:

> "The jurisdiction of this Court is not governed by statistics, or the momentum of cases here."

And, as was said in one of the decisions cited in Petitioner's brief at page 23, *Steinberg v. Toro*, 95 F. Supp. 791, at page 795 (D. C. Puerto Rico):

> "Congress, in conferring jurisdiction upon the federal courts to entertain suits between citizens of the the different states intended that when a citizen of one state sought to enforce or protect a right against a citizen of another state, he should be entitled to invoke the jurisdiction thus conferred upon the federal courts as a matter of right. When a suitor comes within the requirements of diversity jurisdiction, he should be able to successfully invoke it, whatever his reasons, and a refusal to exercise jurisdiction in such cases would thwart the very purpose for which such jurisdiction was conferred."

It is also argued that the purpose of diversity was to afford protection to non-residents who might be unable to get a fair trial in the State court. The effect of this argument is to say that the federal court should have jurisdiction only when a non-resident elects to invoke it, although

admittedly Congress has given the same election to a Louisiana citizen as is given a citizen of any other State. What would be fair about a rule that would permit a foreign insurance company, if sued in the state court, to remove it to the federal court, but deny a Louisiana citizen the right initially to bring suit in the same court? And it seems to us a little late for foreign insurance companies to be arguing at this time that they are unable to secure a fair trial in the federal courts. They argue in one breath that Congress has passed the diversity statute to insure non-residents fair trials; and yet, at the same time argue that they are being crucified in federal court trials where the plaintiffs invoke the jurisdiction of such courts! But, as stated by Judge Porterie in the *Lewis* case, supra:

> "Defendent urges that the state court with jurisdiction of this case is a fair court; besides not saying that this is also a Court of Justice, defendent forgets that plaintiffs are not only citizens of Louisiana but also are citizens of these United States."

It is also argued in Petitioner's application to this Court for writs of certiorari that if Louisiana citizens are allowed to institute these actions directly against foreign insurance companies alone, the biased and prejudicial advantages which they will enjoy will substantially increase the loss experience of the insurance companies in the State of Louisiana. There is no proof in the record that such will be the ultimate result. In fact, on April 14, 1954, at least one insurance company was granted permission by the Louisiana Insurance Rating Commission to reduce its

rates by 25% from the rates promulgated and published by the Casualty and Surety Division of that Commission.[4] In granting this application the Commission had this to say:

> "The Company has demonstrated through its dividend payments of 20%, out of the ordinary mandatory premium charges, that it is capable at least for the next 12 months of collecting 25% less than the manual rate and still survive financially.
>
> "The dividends paid in Louisiana and the operation of the Company here and elsewhere, as testified to by the numerous witnesses of Applicant, convinces the Commission that the Applicant is in a position to pass on to their Louisiana policyholders a 25% saving in the total cost of their insurance, and, in view of the denial of the membership fee plan, the application for a 25% deviation is granted."

While it may be argued that the State Farm Mutual is in a position to make this rate reduction while other insurance companies are not, because it uses more care in selecting its insured, the Louisiana Insurance Rating Commission made one significant statement regarding the

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4. Decision of the Louisiana Insurance Rating Commission in the **Matter of the Application of State Farm Mutual Automobile Insurance Company of Bloomington, Illinois** (certified copy of this decision has been delivered to the Clerk of this Court). In the same opinion the Rating Commission denied applicant's request that it be permitted to charge and collect a membership fee. This portion of the decision is under attack in the case of **State Farm Mutual Automobile Insurance Co. v. Louisiana Insurance Commission, et al.**, No. 49, 480, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

cost of automobile casualty insurance in Louisiana when it said:

> "As a matter of fact the insuring public of Louisiana has fared extremely well under the formula and the rating system of the State. It was pointed out by the Chairman during the course of this hearing, that a survey of staff technicians disclosed that in the Baton Rouge area *costs to policy holders for private passenger automobile insurance since 1940 has increased only 42%, as compared with increases of 147.1% in labor and 91.4% [in cost] of living generally.*" (Emphasis supplied).

CONCLUSION

It is therefore respectfully submitted that the opinion and decision of the Fifth Federal Circuit in holding that the District Court for the Western District of Louisiana has jurisdiction to hear and adjudicate this cause is correct and should be affirmed at petitioner's cost.

Respectfully submitted,

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